IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MEMPHIS NATURAL GAS COMPANY,
A Corporation, Petitioner,
VS.
GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee,
Respondent.

No. 218

EXCISE TAX CASE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This suit was brought by petitioner against respondent in the Chancery Court of Davidson County, Tennessee to recover excise taxes, interest and penalties aggregating $67,025.02 paid under protest for the tax-paying periods July 1, 1939 through July 1, 1942. The Chancery Court

denied recovery. The Supreme Court of Tennessee on February 5, 1944 ordered refund of penalties, but affirmed liability for excise taxes and interest. R. 227.

The statute here involved requires that all domestic and foreign corporations pay "annually an excise tax, in addition to all other taxes, equal to three and three-quarters per cent. (3¾%) of the net earnings for their next preceding fiscal or calendar year, from business done within the State." In the case of corporations doing business in Tennessee and elsewhere "the net earnings shall be apportioned as hereinafter set forth and the net earnings thus apportioned to Tennessee shall be deemed to be the earnings arising from business done within the State and shall be the measure of this tax."

Chapter 99, Tennessee Public Acts 1937, p. 375, as amended by Chapter 176, Acts of 1937, p. 683, Code Paragraph 1316.

We have no question about the fairness of the allocation formula used by respondent. If petitioner be liable for any excise taxes, the amount assessed is equitable.

Petitioner is a Delaware corporation with its general offices at Memphis, Tennessee, and is engaged solely in the maintenance and operation of an interstate natural gas transmission line transporting natural gas for sale and delivery at wholesale to distributing companies at various delivery points on the system.

The pipe line originates in Louisiana, passes through the southeast corner of Arkansas, crosses the Mississippi River into Mississippi and thence north into Tennessee, skirts Memphis and terminates at Jackson, Tennessee. Map, Ex. 1, R. 26.

Petitioner has compressing stations in Louisiana, Arkansas and Mississippi and numerous delivery points on its line where the gas is measured by a meter and the gas pressure reduced by a mechanical regulator before delivery to the distributing companies.

All deliveries in Tennessee are made to the distributing companies which are customers of petitioner. There are but two, the Memphis Light, Gas and Water Division, owned by the City of Memphis, and the West Tennessee Gas Company, a private corporation.

It is undisputed that petitioner, after transporting the gas from Louisiana into Tennessee, does absolutely nothing other than to deliver same to the distributing companies. Petitioner has no interest in the distributing companies or their earnings or their properties, and petitioner's sole interest and activity in Tennessee is the operation of its interstate pipeline and the maintenance of general offices in Memphis which are accessory to the interstate business. R. 42-47.

Petitioner's business and activities in Tennessee are solely of an interstate nature. The collection of these excise taxes, which are synonomous with privilege taxes, violates the Commerce Clause of the United States Constitution, Article I, Section 8, prohibiting the exaction of an excise or privilege tax for the right to engage exclusively in interstate commerce.

We are not here concerned with an income tax or principles of law relating to the extent to which income taxes may be exacted under the Commerce Clause. The

Tennessee Constitution prohibits all income taxes other than upon "income derived from stocks and bonds."

Article II, Section 8;
Evans v. McCabe, 164 Tenn. 672.

The Supreme Court of Tennessee has concluded that this court has recently authorized the collection of excise or privilege taxes from a foreign corporation engaged exclusively in interstate commerce. Petitioner admits there would be liability if petitioner were doing any intrastate business in Tennessee, but such is not the case. The Supreme Court of Tennessee did not find that petitioner is doing local or intrastate business, but affirmed the tax because recent decisions of this court are said to warrant this result.

II.

STATEMENT OF JURISDICTION

The statute believed to sustain jurisdiction is 28 USCA, Par. 344(b):

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had *** where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

The Federal questions sought to be reviewed were raised by the pleadings in the court of first instance. Paragraph IV of the complaint states in part:

> "(a) Complainant does no intrastate business in Tennessee and therefore has no net earnings which are subject to the excise tax.
>
> "(b) The State of Tennessee may not exact an excise or privilege tax of the complainant for the right to do an interstate business as such a tax violates Article I, Section 8, United States Constitution that 'The Congress shall have power to regulate commerce with foreign nations, and among the several States.' The enforcement of the tax against complainant also violates the Fourteenth Amendment, Section I of the United States Constitution:
>
> " 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.'
>
> "Congress has not authorized the States to exact of corporations an excise or privilege tax for the right to do an interstate business. In addition, the enforcement of the tax against complainant violates the due process of law clause of the Federal Constitution as the imposition and enforcement of the tax against complainant results in the State of Tennessee collecting taxes from properties and business done beyond the boundaries of the State of Tennessee and not fairly attributable to the State of Tennessee."
>
> R. 3.

The Federal questions were raised in the Supreme Court of Tennessee by reference to the pleadings and assignments of error as shown by the opinion. R. 227.

February 5, 1944, opinion by Supreme Court of Tennessee. R. 227.

February 10, 1944, decree entered ordering refund to petitioner of penalties totaling $24,881.23. R. 235.

February 16, 1944, petition by respondent to have the court settle differences among counsel about the proper decree. R. 240. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886.)

February 19, 1944, petition by Memphis Natural Gas Company for entry of decree in conformity with its interpretation of the Court's opinion. R. 236. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886.)

March 4, 1944, the Supreme Court of Tennessee denied petitions to rehear and reconsider the decree theretofore entered and the judgment became final. R. 244.

May 29, 1944, order extending certiorari time to and including July 5, 1944. R. 281.

This petition for certiorari is being filed prior to July 5, 1944.

The Supreme Court of Tennessee has decided these Federal questions of substance in a way probably not in accord with applicable decisions of this court.

The Federal questions here involved seem to be identical with those in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C., Dec. 24, 1943) and in which this court granted certiorari on May 23, 1944.

III.

THE QUESTIONS PRESENTED

1.

Tennessee cannot exact an excise or privilege tax from a foreign corporation engaged solely in interstate commerce. It violates the Commerce Clause of the United States Constitution, Article I, Section 8.

2.

The fact that this excise tax is measured by net income allocated to Tennessee must not obscure the nature of the tax involved. This is an excise tax and may not be considered as an income tax because such an income tax is absolutely prohibited by the Constitution of Tennessee, Article II, Section 8.

3.

The maintenance of general offices in Tennessee by a foreign corporation engaged exclusively in interstate commerce does not change the rule that Tennessee cannot exact an excise or privilege tax from such business so engaged solely in interstate commerce as the maintenance of the general offices are a part of and accessory to interstate commerce.

4.

A pipe line company is engaged exclusively in interstate commerce when it transports natural gas from one State to another and sells it wholesale to distributing companies and to an industrial consumer which takes the gas from a distributing system owned and operated by a distributor.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In order for this excise tax to be collectible from the petitioner it must appear that petitioner is engaged in some intrastate business. If the foreign corporation be engaged in both kinds of business and the excise tax is apportioned to the business fairly attributable to the taxing State, it is then permissible, but an excise tax upon a foreign corporation engaged exclusively in interstate commerce seems to violate the Commerce Clause. This court has several times decided in the past that even though the foreign corporation so engaged exclusively in interstate commerce maintains general offices within the taxing State, it nevertheless cannot be held liable for excise and privilege taxes as they are prohibited by the Commerce Clause.

The decision of the Supreme Court of Tennessee is based squarely upon Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, involving petitioner's Tennessee excise tax liability for the years 1932 through 1935, but the decision is not applicable here because the facts there involved are totally dissimilar to those here involved. Liability in the said decision was adjudged because petitioner was, in those years, doing intrastate business in Memphis by virtue of being a partner of the Memphis Power & Light Company in the distribution of gas. The contract then in effect between petitioner and the Memphis Power & Light Company was construed by both the Supreme Court of Tennessee and this court to be a partnership engagement described as "a profit-sharing joint adventure in the distribution of gas" and that the two companies were "in

effect partners or joint enterprisers in the distribution and sale of gas to Tennessee consumers."

This court said:

> "* * * the taxpayer's net earnings under the contract were subject to local taxation."

Petitioner was therefore held liable for the excise taxes as it was engaged in those years in local or intrastate business.

The Memphis Power & Light Company sold on June 27, 1939 its distribution properties to the City of Memphis, was liquidated and the contract involved in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 was terminated as of said date. R. 135-143.

The taxes here involved are for the years subsequent to the termination of the contract with the Memphis Power & Light Company on June 27, 1939.

Since then petitioner has had no interest in or partnership arrangement with any distributing company, and its sole interest and activity in Tennessee is the ownership and operation of its interstate pipe line.

In a companion case involving gross receipts taxes but not here involved as the Supreme Court of Tennessee ordered a refund to petitioner, the trial court found that petitioner "derived no receipts from intrastate business in this State."

R. 221.

The Supreme Court of Tennessee affirmed on February 5, 1944.

Memphis Natural Gas Co. v. McCanless, (Gross Receipts Tax Case), ____Tenn.____, 177 S. W. (2) 841.

The Supreme Court of Tennessee reached its conclusion that petitioner is liable for excise taxes subsequent to June 27, 1939 by reference to dicta in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649:

> "In any case if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there * * * is not prohibited by the Commerce Clause on which alone taxpayer relies."

We refer to this paragraph as dicta because the only question involved in the former appeal was whether or not petitioner was engaged in some intrastate business. The excise tax statute in effect in the years involved in the former appeal levied the tax against net earnings "arising from business done wholly within the State, excluding earnings arising from interstate commerce."

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

After having found that petitioner, in those years, was engaged in some intrastate business, this court made, at the conclusion of the opinion, the general observation set forth above. We respectfully submit that the former appeal did not involve questions of income taxation which are wholly different from the question of privilege tax liability of a foreign corporation engaged exclusively in interstate commerce.

The paragraph in question, quoted supra, was recognized and labeled as dictum in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C.).

The former appeal could not have involved income taxes as they are expressly prohibited by the Tennessee Constitution.

The Supreme Court of Tennessee concluded in the present appeal that it is bound by the dictum appearing in the opinion disposing of the former appeal. When speaking of the dictum the Supreme Court of Tennessee said in the present appeal:

> "From the foregoing it seems evident that the Supreme Court ruled that if, as insisted, all complainant's business was interstate and it was engaged in no joint enterprise of distribution, nevertheless it was still liable for the tax."
>
> R. 231.

But this court did not so rule. It ruled in the former appeal that petitioner was in those years engaged in intrastate business and therefore liable for the tax. Having thus decided the case, this court observed, when speaking generally of permissible taxation under the Commerce Clause, that a foreign corporation engaged solely in interstate commerce and having a commercial domicile within the taxing State can be held liable for a non-discriminatory income tax upon its net income attributable to activities within the taxing State.

This principle can have no application here because the plain mandate of the Constitution of Tennessee absolutely prohibits income taxes. This excise or privilege tax certainly cannot be justified by applying to it principles of income taxation without violating the express mandate of the Tennessee Constitution. Our question is whether or not a foreign corporation with its general offices in Tennessee and engaged exclusively in interstate commerce can be held for excise or privilege taxes.

There can be no doubt about the fact that this court has several times in the past decided that this cannot be

done. Likewise there cannot be any doubt that this court has not down to the present time ruled that it may be done, and there is nothing in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 authorizing such a result.

Petitioner respectfully submits that the decision of the Supreme Court of Tennessee is in direct conflict with Ozark Pipe Line Co. v. Monier, 266 U. S. 555, where a Maryland corporation qualified for business in Missouri, operated a pipe line from Oklahoma through Missouri to Illinois, maintained in Missouri two general offices and was held not liable for the Missouri franchise tax imposed upon all corporations. The same conclusion was reached in Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, involving an excise tax. There are many other cases to the same effect.

Petitioner respectfully submits that the Supreme Court of Tennessee has decided this Federal question of substance in a way probably not in accord with applicable decisions of this court.

The Supreme Court of Tennessee pretermitted the question of whether or not petitioner is engaged exclusively in interstate commerce and stated:

> "We do not find it necessary to pass on this controversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Co. v. Beeler, supra."

It concluded that the dictum in Memphis Natural Gas Co. v. Beeler, makes petitioner liable for the excise taxes whether or not exclusively engaged in interstate commerce. This seems fallacious for the reasons heretofore pointed out.

There can be no doubt that a pipe line company such as petitioner is engaged exclusively in interstate commerce as this proposition has been settled many times by this court and as recently as in Illinois Gas Co. v. Public Service Co., 314 U. S. 498.

The respondent makes the argument that petitioner is engaged in intrastate commerce because of the character of one of its customers in Tennessee. Petitioner has three customers in Tennessee. Two of them are distributing companies and the other is the Memphis Generating Company, which is several miles removed from petitioner's pipe line and is served by the distributing system of the Memphis Light, Gas & Water Division. The Memphis Generating Company takes its gas directly from the distribution system of the Memphis Light, Gas & Water Division. As the gas passes from the distributing system into the plant of the Memphis Generating Company it is measured, and the Memphis Generating Company pays petitioner directly for the same on a monthly basis.

> See the Map, Exhibit 2, R. 40, showing the Memphis Generating Company on the distributing system and several miles distant from petitioner's pipe line. Also R. 44, 56.

It seems unnecessary to argue the proposition that this does not constitute intrastate business. It has been expressly so decided in Illinois Gas Co. v. Public Service Co., 314 U. S. 498 and also in Memphis Natural Gas Co. v. McCanless (Gross Receipts Tax Case), ____Tenn.____, 177 S. W. (2) 841, decided February 5, 1944, which is a companion suit but not here involved as the Supreme

Court of Tennessee ordered the gross receipts taxes refunded to petitioner.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Tennessee commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named a transcript of the record and proceedings herein; and that the decree of the Supreme Court of Tennessee be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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